Supreme Court, U.S.
FILED

No. 011779 JUN 3 2002

IN THE SUPREME COURT OF THE UNITED STATES

---

ARTHUR CALDERON, Warden, *Petitioner,*

v.

BENJAMIN WAI SILVA, *Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# PETITION FOR WRIT OF CERTIORARI

---

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
ROBERT M. FOSTER
Supervising Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2284
Fax: (619) 645-~~2271~~
Counsel for Respondent

20 pg
$10

**CAPITAL CASE**

## QUESTIONS PRESENTED

1. In a death penalty case, where the defendant personally commands that his appointed counsel not contact either of his parents for an investigation of possible mitigating evidence for the penalty phase and couples that directive with a threat to do something in front of the jury to make the jury hate him if defense counsel does make such contacts, does defense counsel nevertheless have a Sixth Amendment duty to contact the parents so as to investigate all relevant potentially mitigating evidence?

2. In reversing this death penalty case did the Ninth Circuit create a situation where death penalty defense counsel has an obligation to present any and all possible mitigating evidence even when doing so is likely to alienate the client and thus decrease counsel's overall ability to effectively represent the client?

3. May a federal appellate court reject factual determinations made by a federal district court and substitute its own version of events where the testimony in question turns on an issue of credibility resolved by the district court?

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION OR JUDGMENT BELOW | 1 |
| STATEMENT OF JURISDICTION | 2 |
| RELEVANT CONSTITUTIONAL PROVISIONS | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 4 |
| A. Trial Counsel's Duties | 9 |
| B. Requirement Of Prejudice | 12 |
| CONCLUSION | 14 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **Cases** | |
| *Bell v. Cone*<br>__L. Ed.2d. ___<br>(2002 LEXIS 4020 filed May 28, 2002) | 7, 13 |
| *Cabana v. Bullock*<br>474 U.S. 376<br>106 S. Ct.689<br>88 L. Ed. 2d 704 (1986) | 11 |
| *Caro v. Woodford*<br>280 F.3d 1247 (9th Cir. 2002) | 7 |
| *Karis v. Calderon*<br>283 F.3d 1117 (9th Cir. 2002) | 8 |
| *McMann v. Richardson*<br>397 U.S. 759 (1970) | 5 |
| *People v. Silva*<br>45 Cal.3d 604<br>247 Cal.Rptr. 573 (1988) | 3 |
| *Roe v. Flores-Ortega*<br>528 U.S. 470 (2000) | 9, 12 |
| *Silva v. California*<br>494 U.S. 1039 (1990) | 3 |
| *Silva v. Woodford*<br>279 F.3d 825 (9th Cir. 2002) | 1 |

## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *Strickland v. Washington* 466 U.S. 668 (1984) | 5, 9, 12 |
| *United States v. Cronic* 466 U.S. 648 (1984) | 6 |
| *Williams v. Taylor* 529 U.S. 362 (2000) | 5, 9, 12 |
| **Constitutional Provisions** | |
| United States Constitution | |
| Sixth Amendment | 2, 5, 6 |
| Eighth Amendment | 6 |
| **Statutes** | |
| California Penal Code | |
| § 187 | 3 |
| § 190.2 | 3 |
| § 190.2, subd. (a)(17)(B) | 3 |

**IN THE SUPREME COURT OF THE UNITED STATES**

No.

---

ARTHUR CALDERON, Warden, *Petitioner,*

**v.**

BENJAMIN WAI SILVA, *Respondent.*

---

Jeanne Woodford, Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals, Appendix A, is reported at *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002). The order denying rehearing and denying rehearing en banc is unreported. App. B. The order of the District Court denying

habeas corpus relief from respondent Silva's death sentence, Appendix C, is unreported.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on February 1, 2002. It was amended on February 22, 2002. The petition for rehearing and suggestion for rehearing en banc was denied on March 6, 2002. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

## STATEMENT OF THE CASE

The murder for which Petitioner has been sentenced

to death occurred on January 12, 1981, outside of the town of Madeline, California. He, and two cohorts, kidnapped and robbed two college students driving towards their campus in Oregon. They repeatedly sexually assaulted and raped the female student before killing her. They also murdered the male student. Silva was sentenced to death for a murder in violation of California Penal Code sections 187 and 190.2, with a special circumstance of kidnapping for the purpose of robbery found true. California Penal Code section 190.2, subdivision (a)(17)(B).

The California Supreme Court affirmed both the conviction and death sentence on June 9, 1988. *People v. Silva*, 45 Cal.3d 604, 247 Cal.Rptr. 573 (1988). Petitioner filed a writ of habeas corpus in the California Supreme Court which was denied on September 24, 1987. A second petition for writ of habeas corpus was denied on July 26, 1989. A petition for writ of certorari was denied by this Court on March 19, 1990. *Silva v. California*, 494 U.S. 1039 (1990).

Petitioner's first federal petition for writ of habeas corpus was filed on June 25, 1990 in the District Court for the Central District. On April 8, 1991, the District Court issued a tentative order denying the request for an evidentiary hearing and denying the petition on the merits. The California Public Defender's Office suddenly discovered a conflict and was

granted permission to be relieved. New counsel was appointed.

On May 31, 1994, the District Court granted Petitioner's request for limited discovery and an evidentiary hearing. Following lengthy depositions, the parties submitted the matter on the basis of the deposition transcripts and other exhibits.

On February 23, 1999, the District Court issued an order adopting its prior orders and denying the petition in its entirety. The District Court denied a certificate of appealability. On May 28, 1999, the Ninth Circuit granted a certificate of appealability.

In an opinion filed on February 1, 2002 and amended on February 22, 2002, the Ninth Circuit reversed the penalty phase of the judgment. It also remanded the matter to the District Court for an evidentiary hearing on a claim that the prosecution had committed Brady error by disclosing some, but not all aspects of a plea bargain with a co-perpetrator. The State's petition for rehearing and suggestion en banc were denied on March 6, 2002. With this denial of rehearing the reversal of the penalty phase became final.

## REASONS FOR GRANTING THE WRIT

In a ten week period of time, the Ninth Circuit

reversed three California death penalty judgments. In doing so that court dictated rules of conduct for criminal defense counsel that distort and expand the duties under Strickland far beyond anything ever contemplated by this Court. The Ninth Circuit has created a situation where counsel must fully investigate and present every possible piece of possibly mitigating information, even when doing so would be directly counter to the demands of the defendant, would risk disrupting the attorney client relationship, and would create a substantial risk of the defendant acting out in front of the jury in an effort to alienate them. Such is not, and should not be, the law.

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). A state prisoner claiming violation of this right must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "It is past question," *Williams v. Taylor*, 529 U.S. 362, 391 (2000), that *Strickland* sets forth the rules by which any claim of ineffective assistance by trial counsel must be judged. It is equally clear the same standards apply to both the guilt and penalty phases of a capital trial. *Strickland*, 466 U.S. at 686-687 ("For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be

distinguished from an ordinary trial.").[1] "As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 122 S.Ct. 1237, 1240 (2002), slip op. at 3, *citing Strickland.*

As explained in *Mickens*, 122 S.Ct. at 1241; slip op. at 3-4, the Court has established limited exceptions to the requirement of an "individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." One may arise where trial counsel actively represented conflicting interests, *id.*, a circumstance not at issue in this case. Otherwise a defendant may be entitled to a presumption of prejudicial effect "where counsel has been denied entirely or during a critical stage of the proceeding." *Id.* at 1241; slip op. at 3. The Court explained in *United States v. Cronic*, 466 U.S. 648, 659 (1984), that other than a complete absence of counsel, a denial of the Sixth Amendment right may occur "if counsel entirely fails to subject the prosecution's case to meaningful

---

1. As in Florida the penalty phase of a California capital trial is heard by a jury which renders a verdict on the appropriate sentence. But the California jury verdict is not, as in Florida, a mere recommendation; the California penalty jury is the sentencing authority within the meaning of the Eighth Amendment.

adversarial testing . . . ." This Court recently held that counsel's actions in the penalty phase of a capital case must result in a "complete" failure to respond to the prosecution's case before a per se rule of prejudice may be employed. *Bell v. Cone*, __L. Ed.2d. ___, (2002 LEXIS 4020 filed May 28, 2002). In Silva's case, defense counsel did present witnesses at the penalty phase: those witness Silva had personally selected. Thus a presumption of prejudice was improper. The Ninth Circuit violated the holding in *Bell v. Cone, supra,* by utilizing an analysis that simply presumed prejudice in the face of unpresented penalty phase evidence.

The Ninth Circuit granted habeas corpus relief to Silva in this case based upon its determination that the defense counsel had a duty to violate his client's express demand that his parents not be contacted as a source of potential mitigating evidence. In doing so the Ninth Circuit unjustifiably rejected testimony from trial defense counsel on the critical issue of Silva's demands, testimony specifically found reliable by the Federal District Court Judge, and instead seized upon testimony given by defense counsel when the critical issue, whether Silva forbid talking to parents, as well as friends and any childhood evidence, was not the focus of the inquiry.

The effect of this ruling, when combined with the decisions in *Caro v. Woodford,* 280 F.3d 1247 (9th Cir. 2002)

and *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002), is that the intermediate appellate court has established explicit, mandatory, penalty phase investigation responsibilities to "unearth" all potential mitigating evidence; which trial counsel must satisfy or be found ineffective per se. The Ninth Circuit has further established what is in effect a per se rule of prejudice whenever potential mitigating evidence is uncovered after trial.[2/] The Ninth Circuit has thus established both performance and prejudice tests that are fundamentally at odds with *Strickland* and yet will govern all future Ninth Circuit capital cases unless this Court grants certiorari.[3/]

It is intolerable under notions of comity and

---

2. In an opinion filed this same month Judge Kleinfeld expressly observed that the court had created a per se rule of reversal whenever trial counsel had not introduced specific, newly developed evidence at the penalty phase. *See Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (Kleinfeld, J., dissenting).

3. Not surprisingly, over a ten-week period from February 1, 2002, to April 24, 2002, the Ninth Circuit reversed the death sentence in three other California cases for ineffective assistance of counsel, *see Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002); *Viscotti v. Woodford*, ___ F.3d ___, ___ U.S. ___, 2002 LEXIS 7489 (2002), and remanded a fourth for an evidentiary hearing on such a claim. *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002).

federalism that there is one rule for effective assistance of counsel in the Ninth Circuit, a rule of its own making, and another rule, this Court's *Strickland* rule in the other 41 states outside the circuit. See *Williams v. Taylor, supra,* 529 US at 389 [Steven, J. writing tha the AEDPA was designed to prevent the law from being "applied by the federal courts one way in Virginia and another in California."]

**A. Trial Counsel's Duties**

Because a "wide range of reasonable professional conduct" will satisfy the *Strickland* standard, 466 U.S. at 689, this Court has "consistently declined to impose mechanical rules on counsel . . . ." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). The relevant question is whether trial counsel's decisions were reasonable. *Id.*

Here defense counsel was faced with a client who adamantly objected to the calling of his parents as witnesses at the penalty phase and objected to contacting them as a source of other potentially mitigating evidence. This demand was coupled with a threat from Silva to do something in front of the jury to make it hate him should counsel disobey this command.

The defense attorney, Thomas Buckwalter, tried to convince Silva that the testimony of family could be important

at the penalty phase but Silva still refused to allow it. Buckwalter told Silva that he needed mitigating evidence for the penalty phase and that would basically be information from Silva's family and about his background. Buckwalter made it clear that Silva's decision increased the chance of a death sentence. Silva told Buckwalter that if he was going to get the gas chamber, so be it, but Buckwalter was not going to contact his family members.

Later Buckwalter asked him to reconsider, but Silva refused. Buckwalter did not agree with Silva's decision. Had Buckwalter thought that Silva was incompetent, he would have ignored the request not to contact friends or family. Buckwalter had no doubt that if he did contact any family members or looked into Silva's background behind Silva's back and Silva learned of it, it would alienate his relationship with Silva. The relationship had been hard enough to develop and Buckwalter did not want to risk alienating Silva. (Appendix C at 108-138.)

The Ninth Circuit decision simply ignores Silva's threats to do something in front of the jury if Buckwalter contacted family. Thus the Ninth Circuit's holding that Buckwalter nevertheless should have contacted the family is misbegotten because it ignores the realities of the situation. The Federal District Judge, who had seen the videotapes of

Buckwalter's testimony, found that his "failure to investigate was entirely due to Silva's own instructions to his lawyer." (Appendix C at 128.) The Ninth Circuit rejected this credibility-based determination of the lower court and substituted its own factual determination for that of the lower court. There was no basis for the appellate court to reject a credibility determination made by the lower court. As this Court has noted, credibility determinations "could not be accurately made by an appellate court on the basis of a paper record." *Cabana v. Bullock*, 474 U.S. 376 n.5, 106 S. Ct.689, 88 L. Ed. 2d 704 (1986).

Having violated this Court's determination that credibility decisions should be left to the trier of fact, the Ninth Circuit then rejected the testimony explicitly relied upon by the district court. Not surprisingly, it then concluded that counsel had not acted reasonably under the circumstances. The rule of conduct mandated by the Ninth Circuit's decision is at odds with the numerous decisions of this Court holding that all that is required is for counsel to act reasonably

The requirement that trial counsel must find "all" mitigation to avoid being found ineffective, as well as the "affirmative duty" to investigate avenues adamantly opposed by the client, burden trial counsel with explicit duties which are inconsistent with this Court's refusal to establish "bright-line"

rules of performance. *Roe v. Flores-Ortega*, 528 U.S. at 480.

In doing so, the Ninth Circuit has established a rule for federal habeas corpus that is unique to the Ninth Circuit.

### B. Requirement Of Prejudice

The *"Strickland* test 'of necessity requires a case-by-case examination of the evidence.'" *Williams v. Taylor*, 519 U.S. at 391. Reversal is justified only if the petitioner carries his burden of proving there is a "reasonable probability" the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The Court explained in *Williams* that when assessing the prejudice component of *Strickland*, a court must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation." *Id.* at 397-398. The Ninth Circuit acknowledged *Williams*, App. A at 15, but then applied its own per se reversal standard.

Relying on claims that Silva had a history of mental problems and substance abuse, the Ninth Circuit found that the "failure" by trial defense counsel "undermined confidence in the outcome". The Ninth Circuit did not examine the

prosecution evidence but concentrated only upon the claims of what might have been presented had defense counsel ignored the instructions of his client. The Ninth Circuit also failed to calculate the impact of Silva's threatened outburst in front of the jury had counsel contacted the parents.

The Ninth Circuit concluded that irrespective of what the jury actually heard, absent the new evidence the penalty determination was not reliable. The circuit court thus supplanted the reasonable probability test set forth in *Strickland* and this Court's subsequent Sixth Amendment cases with a new rule of per se reversal whenever additional mitigation is developed in collateral proceedings. As this Court recently held, such a per se rule is inapplicable unless defense counsel puts on no evidence at all at the penalty phase. *Bell v. Cone, supra.*

Given the relative ease with which habeas corpus counsel are able to locate some new evidence, the Ninth Circuit rule makes reversal of the death sentence for ineffective assistance of counsel a virtual certainty in every case. The decision's inconsistency with this Court's precedent and conflict with other circuits warrant review by this Court.

## CONCLUSION

For the foregoing reasons, certiorari should be granted by this Court.

Dated: May 31, 2002

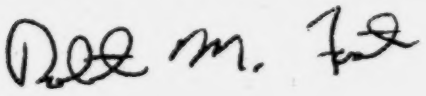
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

WILLIAM M. WOOD
Supervising Deputy Attorney General



ROBERT M. FOSTER
Supervising Deputy Attorney General
Counsel of Record

Counsel for Respondent

RMF:baw
SD1990XS0005

AFFIDAVIT OF SERVICE BY MAIL

| | |
|---|---|
| Attorney:<br>BILL LOCKYER<br>Attorney General of<br>the State of California<br>Robert M. Foster<br>Supervising Deputy Attorney General<br><br>110 West A Street, Suite 1100<br>P. O. Box 85266<br>San Diego, California 92186-5266 | No.<br><br>**ARTHUR CALDERON, Warden,**<br>Petitioner.<br><br>v.<br><br>**BENJAMIN WAI SILVA,**<br>Respondent, |

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within **PETITION FOR WRIT OF CERTIORARI; APPENDICES TO PETITION FOR WRIT OF CERTIORARI** as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Phillip A. Trevino
2261 Market Street, Suite 336
San Francisco, CA 94114
[Attorney for Respondent Benjamin Wai Silva]

U.S. Court of Appeals for the Ninth Circuit
Hon. Cathy A. Catterson, Clerk
95 Seventh Street
San Francisco, CA 94103-1526

Michael J. Brennan
729 Marine Avenue
Manhattan Beach, CA 90266
[Attorney for Respondent Benjamin Wai Silva]

Clerk of the Court
United States District Court Central District
312 N. Spring Street, Rm. G-8
Los Angeles, CA 90012

California Appellate Project
Attn: Linda Lenker
One Ecker Place, Suite 400
San Francisco, CA 94105

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 3rd day of June 2002.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, June 3, 2002.

Robt M. Foster

ROBERT M. FOSTER